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NO. 57445-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HAJRUDIN KUSTURA, GORDANA LUKIĆ, AND MAIDA MEMIŠEVIĆ,

Consolidated Appellants,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ANSWER TO ACLU AMICUS CURIAE BRIEF

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I. INTRODUCTION

Without providing references to the record,[1] American Civil Liberties Union (ACLU) makes factual assumptions upon which it presents constitutional due process analysis for Appellants Kustura, Lukić, and Memišević. ACLU relies on other-jurisdiction cases involving distinct factual situations or involving risk of loss of serious liberty interest such as criminal prosecutions or deportations. ACLU claims that due process requires (1) the Department of Labor & Industries to provide to all workers' compensation claimants with limited English proficiency (LEP) notice of its decisions in their primary languages and (2) the Department and Board of Industrial Insurance Appeals to provide interpreter services including those for workers' confidential communications with their attorneys during Department claim administration and workers' appeals to the Board.

ACLU's due process analysis is flawed as it rests on *theoretical* premises not based on the record, or legal principles that do not squarely apply in this case. Due process "is flexible and calls for such procedural protections as *the particular situation* demands." *Mathews v. Eldridge*,

[1] ACLU states that its "factual summary is drawn from Appellants' briefing and the trial court order." ACLU at 3. This does not meet the requirement of RAP 10.3(a)(5), (a)(6), (e), that reference to the record be included "for each factual statement" and argument. *See, e.g., In re Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) ("strict adherence to [RAP 10.3] is not merely a technical nicety").

424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (emphasis added). For example, in challenging the Department orders as written in English, ACLU fails to note that, in *Kustura* and *Lukić*, the Department sent all of its appealed orders, and in *Memišević*, three of the four appealed orders, *to the claimants' current English-speaking attorney.*[2] Nor does ACLU note that Memišević used an interpreter "every time" she received a document from the Department, *Memišević* (12/11/03) 76, and Lukić had an attorney dealing with her claim, CABR 174-175 (stipulated history).

In making a broad claim that LEP claimants have a constitutional right to notice in their primary languages, ACLU does not try to distinguish any of the federal and other-jurisdiction authority previously cited by the Department. The overwhelming weight of authority consistently holds that, in civil cases involving only economic interests, such as here, due process does not require government to provide notices or services to LEP persons in their primary languages. *See infra* Section II.A. Nor does ACLU discuss the "important distinction" for due process between "government-initiated proceedings seeking to affect adversely a

[2] *Kustura* CABR 258-266, 396-398, 403-404, 442-443, 447-448, 445-456, 463-464, 469, 477, 495, 499, 506, 507; *Lukić* CABR 150 (9/19/02 order affirming 8/30/02 order upon Lukić's protest), 532 (3/11/03 order closing Lukić's claim without any permanent partial disability award); *Memišević* CABR 68 (1/27/03 order sent to Memišević), 586 (2/10/03 order sent to her current counsel), 635 (2/24/03 order sent to her current counsel), 662 (3/27/03 letter sent to her current counsel). Neither Lukić nor Memišević presented the unappealed orders setting their time-loss compensation rate at the Board or the Superior Court. Nor did they testify that they did not receive the orders.

person's status" such as "criminal prosecution, deportation or exclusion" and "hearings arising from the person's affirmative application for a benefit". *Abdullah v. INS*, 184 F.3d 158, 165 (2nd Cir. 1999) (due process does not require an interpreter for special agricultural worker status applicants during INS interviews). Nor does ACLU explain why LEP claimants have a constitutional right to an interpreter for their confidential communications with their attorneys, when there is "no constitutional right to counsel afforded indigents involved in worker compensation appeals." *In re Grove*, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995).

The Department (during claim administration) and the Board (during its evidentiary hearings) provided interpreter services to Kustura, Lukić, and Memišević, the extent of which was carefully determined by the Department (during claim administration) and the industrial appeals judge (during the hearings) based on the nature of the issues involved in the *particular circumstances of each case.* ACLU fails to demonstrate a due process violation, let alone an abuse of discretion, or actual prejudice resulting from the lack of additional interpreter services. ACLU's "multi-lingual, pre-printed leaflet" proposal (ACLU at 11-12) is a matter that must be addressed to the Legislature, not to this Court.

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II. ACLU FAILS TO SHOW A DUE PROCESS VIOLATION

ACLU presents analysis based solely on constitutional due process and alleges due process violations by *the Department.* ACLU at 1-2. ACLU correctly notes that Washington's due process clause does not provide greater protection than its federal counterpart. ACLU at 6 n.2.

"Due process requires notice and an opportunity to be heard." *State v. Storhoff*, 133 Wn.2d 523, 527, 946 P.2d 783 (1997). The challenged Department orders and the Board evidentiary hearings in this case satisfied the due process mandate. ACLU fails to prove otherwise.

A. The Department Orders Satisfied "Notice" under Due Process

Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). The Department orders provided such notice.

The courts that have addressed the issue of whether, in civil cases involving only economic interests such as here, due process requires government to provide notices or services to LEP persons in their primary languages have answered the question in the negative. *See Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (unemployment benefit denial); *Toure v. United States*, 24 F.3d 444, 446 (2nd Cir. 1994)

(administrative seizure); *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2nd Cir. 1983) (social security benefit denial), *cert. denied*, 466 U.S. 929, 104 S. Ct. 1713, 80 L. Ed. 2d 186 (1984); *Frontera v. Sindell*, 522 F.2d 1215, 1221 (6th Cir. 1975) (no due process right to civil service exam in Spanish); *Alfonso v. Bd. of Review*, 444 A.2d 1075, 1076-1078 (N.J. 1982) (unemployment benefit denial); *Commonwealth v. Olivo*, 337 N.E.2d 904, 909-910 (Mass. 1975) (condemnation); *Hernandez v. Dep't of Labor*, 416 N.E.2d 263, 266-267 (Ill. 1981) (unemployment benefit denial); *Guerrero v. Carleson*, 512 P.2d 833, 837 (Cal. 1973) (welfare benefit termination), *cert. denied*, 414 U.S. 1137, 94 S. Ct. 883, 38 L. Ed. 2d 762 (1974).

In fact, the deportation case ACLU cites (ACLU at 18) points out that it "has long been established that due process allows notice of a hearing (and its attendant procedures and consequences) to be given solely in English to a non-English speaker if the notice would put a reasonable recipient on notice that further inquiry is required." *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999); *see also Guerrero*, 512 P.2d at 836 ("[T]he government may reasonably assume that the non-English speaking individual will act promptly to obtain [language] assistance when he receives the notice in question."); *Soberal-Perez*, 717 F.2d at 43 ("A rule placing the burden of diligence and further inquiry on the part of a non-

English-speaking individual served in this country with a notice in English does not violate any principle of due process.").

For example, the California Supreme Court has found a notice of welfare payment termination written in English sent to a LEP claimant satisfied due process, when:

> each is printed on letterhead of the Department of Social Services of Los Angeles County; each is personally addressed to the individual plaintiff, by name, address, and case number; each is obviously an official communication, with boxes checked and blanks filled in by hand; and each is dated and signed by a social worker or similar departmental representative.

Guerrero, 512 P.2d at 836. The *Guerrero* Court reasoned that "it may fairly be assumed that a welfare recipient would not be so disinterested in his family's livelihood as to simply ignore an official document delivered in the mail which has *every appearance of relating to his right to receive public assistance payments*." *Guerrero*, 512 P.2d at 837 (emphasis added).

Here, except for the one order sent to Memišević that was timely appealed through her attorney, all of the appealed Department orders here were sent *to the claimants' current English-speaking attorney*.[3] Each of these orders contained the

[3] *Kustura* CABR 258-266, 396-398, 403-404, 442-443, 447-448, 445-456, 463-464, 469, 477, 495, 499, 506, 507; *Lukić* CABR 150 (9/19/02 order affirming 8/30/02 order upon Lukić's protest), 532 (3/11/03 order closing Lukić's claim without any

Department's name and address, a claim manager's phone number, and the claimant's name, claim number, and injury date. These orders were not the first ones they received from the Department; they had applied for and had been receiving benefits with time-loss payment orders. *Kustura* CABR 295-300 (stipulated history); *Lukić* CABR 258-261 (same); *Memišević* CABR 646-651 (same). These orders should alert a reasonable LEP claimant to seek language assistance, if necessary. As Memišević testified, she "always had interpreter" for something important, *Memišević* (10/24/03) 180, and used an interpreter "every time" she received a document from the Department, *Memišević* (12/11/03) 76.

ACLU's reliance on *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006), is misplaced. *Jones* involved a situation where a notice of a tax lien sale sent via a certified mail to a property owner was *returned unclaimed*, yet the government proceeded to sell his property. *Jones*, 126 S. Ct. at 1712-1713. The Supreme Court held "that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Jones*, 126

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permanent partial disability award); *Memišević* CABR 68 (1/27/03 order sent to Memišević), 586 (2/10/03 order sent to her current counsel), 635 (2/24/03 order sent to her current counsel), 662 (3/27/03 letter sent to her current counsel).

S. Ct. at 1713. The *Jones* Court emphasized that the government "knew that [the property owner] could not be reached at his address of record." *Jones*, 126 S. Ct. at 1717. The Court reasoned that if a letter is returned unclaimed, the sender "will ordinarily attempt to resend it," "especially . . . when . . . the subject matter of the letter concerns such *an important and irreversible prospect as the loss of a house*." *Jones*, 126 S. Ct. at 1716 (emphasis added). Unlike the situation in *Jones*, where a property owner *did not receive* the tax sale notice, of which fact the government was aware, there is no claim here that Kustura, Lukić, or Memišević, or their attorney, did *not* receive the Department orders at issue.

ACLU's reliance on *Covey v. Town of Somers*, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1021 (1956), is likewise misplaced. *Covey* involved a notice of real property judicial foreclosure sale sent to the property owner, whom the government knew was an *unprotected incompetent*. *Covey*, 351 U.S. 144-146. The Supreme Court held that notice "to a person known to be an incompetent who is without the protection of a guardian does not measure up to [due process notice] requirement." *Covey*, 351 U.S. at 146. But the lack of English proficiency cannot fairly be equated "with an unsoundness of mind justifying appointment of a legal guardian." *Guerrero*, 512 P.2d at 835 (rejecting LEP welfare recipients' reliance on *Covey* for their claim of due process right to a Spanish notice). "An

incompetent may be unable to understand an official notice no matter how it is explained to him." *Guerrero*, 512 P.2d at 835. By contrast, Kustura, Lukić, and Memišević are admittedly literate in Bosnian and "are without question to understand a Translation of the notice into that language." *Guerrero*, 512 P.2d at 835. *Covey* is inapposite here.

ACLU proposes "a multi-lingual, pre-printed leaflet with all Department mailings to known LEP claimants." ACLU at 11. But the decisions as to whether, when, and in what languages and forms to provide language services should be "best left to those branches of government that can better assess the changing needs and demands of both the non-English speaking population and the government agencies that provide the translation." *Alfonso*, 444 A.2d at 1977; *see also Olivo*, 337 N.E.2d at 910 n.6; *Valdez v. N.Y. City Hous. Auth.*, 783 F. Supp. 109, 121 (S.D.N.Y. 1991). ACLU's proposal should best be addressed to the Legislature, not to this Court. *See Landon v. Plasencia*, 459 U.S. 21, 34-35, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982) (court may not impose "procedures that merely displace congressional choices of policy").

B. <u>ACLU Fails to Show a Due Process Violation at the Board Hearings When All of the LEP Claimants Were Represented and Given an Interpreter for at Minimum Their Testimony</u>

ACLU alleges a due process violation at the Board hearings in this case, claiming that "the Department *permits* the Board to limit severely a

claimant's use of interpreter service during Board hearings." ACLU at 9 (emphasis added). But the "appointment of an interpreter is a matter within the discretion of *the trial court*," *State v. Gonzales-Morales*, 138 Wn.2d 374, 381, 979 P.2d 826 (1999) (emphasis added), here *the Board*, which is charged with conducting the hearings. The Department may *appear at the hearings as a party* in support of its orders, RCW 51.52.100, but ACLU cites no authority that the Department has a power, let alone a duty, to appoint an interpreter for the claimants at the Board hearings.

In any event, ACLU fails to demonstrate a due process violation at the Board hearings. As correctly stated by ACLU (ACLU at 6), process due in a given case depends on (1) the private interest affected, (2) the risk of an erroneous deprivation of that interest through the procedures used and the value of additional safeguards, and (3) the government's interest, including the function involved and the fiscal and administrative burdens the additional safeguards would entail. *Mathews*, 424 U.S. at 334-335.

As to the first *Mathews* factor, ACLU suggests that the interests being affected in this case are "vested" rights to benefits. ACLU at 1, 8, 11. But the interests at stake are in the claimants' *claims* for more benefits than were awarded and special interpreter services during the Department claim administration, which must be distinguished from a *vested* right involved in the *termination* of disability benefits in *Mathews*. *See Am.*

Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 60-61, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) (workers' interests in "their *claims* for payment" are "fundamentally different" from a *vested* right to benefits); *Lander v. Indus. Comm'n of Utah*, 894 P.2d 552, 555 (Utah Ct. App. 1995) (worker's interest in his claim for benefits "falls short of a vested right to benefits as in *Mathews*"); *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 475, 843 P.2d 1056 (1993) ("Where the Department has neither considered nor determined whether a worker is permanently and totally disabled, that worker has *a future expectation of benefits, not a vested right.*").

Willoughby v. Department of Labor & Industries, 147 Wn.2d 725, 57 P.2d 611 (2002), does not hold otherwise. *Willoughby* involved a substantive due process challenge where the Department *determined* a worker to be eligible for benefits but *later cancelled his benefits* by applying a statute (that was found to be unconstitutional), because he was incarcerated and had no spouse or dependents. *Willoughby*, 147 Wn.2d at 728-730, 732-736. This case does not involve substantive due process challenge or cancellation of a vested right to benefits.

Also relevant but not considered by ACLU is the fact that the claimants will be awarded full retroactive relief if they ultimately prevail. *See Mathews*, 424 U.S. at 340 (availability of retroactive relief relevant).

ACLU claims that workers' compensation is "a basic necessity of life akin to health care or welfare payments," citing *Macias v. Department of Labor & Industries*, 100 Wn.2d 263, 668 P.2d 1278 (1983). ACLU at 8-9. *Macias* involved a right to travel challenge to a statutory exclusion of seasonal farm workers from benefits unless they earned at least $150 in a calendar year; the Court concluded that this exclusion penalized them for engaging in farm work (found to involve constitutional right to interstate travel), stating that "medical care is as much 'a basic necessity of life' to an *indigent* as welfare assistance." *Macias*, 100 Wn.2d at 274 (emphasis added). But ACLU is not making a right to travel challenge, and there is no claim that any of the claimants here was indigent. Also, the Supreme Court in *Mathews* distinguished disability benefits from the welfare benefits involved in *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970), stating that eligibility for disability benefits "is not based upon financial need" and is "wholly unrelated to the worker's income or support from many other sources," *Mathews*, 424 U.S. at 340.

As to the second *Mathews* factor, ACLU discusses a hypothetical, where "LEP claimants may not be able to testify on their own behalf, to understand the questions of the Board, or to communicate with counsel." ACLU at 10. There is no dispute that all of the claimants here testified through an interpreter and no claim they did not understand the questions

from the IAJs. *Mathews* "requires consideration of the likelihood of an erroneous deprivation of the private interest involved as a consequence of *the procedures used.*" *Mackey v. Montrym*, 443 U.S. 1, 13, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979) (emphasis added). ACLU's claim that the claimants here were "essentially excluded from the proceedings," ACLU at 12, is mere rhetoric not supported by the record.

The record in this case shows the following. In *Kustura*, the issue was the amount of "wages" for Kustura's time-loss compensation, raising mostly *legal* issues under RCW 51.08.178. *Kustura* CABR 303; Amended Brief of Appellants at 30-39. Kustura brought his own interpreter to the hearing and was permitted to have him present to assist him, although the IAJ used the Board-arranged interpreter for official translation. *Kustura* TR (9/18/02) at 4-5. Kustura's attorney had "no concerns about the qualifications" of the Board-arranged interpreter and did not object to the interpreter. *Kustura* TR (9/18/02) at 4. Although the Board interpreter was not provided for the testimony of Kustura's witnesses, Robert Moss and Garth Fisher, and the Department witness, Ralph Davis, these witnesses addressed only the *employer-paid* cost of providing various benefits to Kustura, and, as the Board pointed out, there was no conflict in their testimony. *Kustura* CABR 11-12. Further, as the Board pointed out, Kustura could have used his interpreter "to assist him

in understanding the testimony of the other witnesses." *Kustura* CABR 158. The IAJ reasonably declined to provide an interpreter for Kustura's confidential communications with his attorney.

The issues in *Lukić* and *Memišević* were whether Lukić was totally and permanently disabled (*Lukić* CABR 263) and the claimed lack of interpreter services during the Department claim administration (*Memišević* CABR 172).[4] Their respective IAJs provided them with an interpreter for all the testimony taken and the statements made throughout the hearings, but not for the perpetuation depositions in which they did not participate or for their confidential communications with their attorney. *Lukić* TR (8/20/03) 14-15, *Memišević* TR (10/24/03) 160-203, *Memišević* TR (12/11/03) 2-127, *Memišević* TR (5/5/04) 2-125. In *Memišević*, the *only* testimony given at a perpetuation deposition was that of her expert, Robert Moss, who was admittedly not a "fact witness," *Memišević* TR (10/24/03) 180, and it was conducted by her attorney on behalf of other claimants in this and other cases before the IAJ made any decision as to the provision of an interpreter, *Memišević* CABR 618 (3/11/03 notice of deposition), 587 (appeal granted effective 3/7/03), 663 (appeal granted

[4] Lukić and Memišević also raised the issue of the amount of their "wages" for purposes of their time-loss compensation rate under the Washington Supreme Court decision in *Cockle v. Department of Labor & Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001). But the Board determined that, as they did not appeal the orders that set their time-loss compensation rate, the orders became final and binding. *Lukić* CABR 16 (Conclusion of Law 2); *Memišević* CABR 5 (Conclusion of Law2).

effective 4/11/03). Lukić prevailed on her appeal based on the evidence she presented and was awarded a pension. *Lukić* CABR 1-17.

As to the third *Mathews* factor, ACLU points out that cost is not controlling. ACLU at 12. But cost is important, especially when it comes out of a state benefit program with finite funds, and "the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Mathews*, 424 U.S. at 348.

The *Mathews* factors in this case should tip the balance in favor of upholding the procedures used, given the nature of the economic interests involved, the presence of an attorney vigorously advocating those interests, the provision of an interpreter for *at minimum* the claimants' testimony (in *Lukić* and *Memišević* for all the testimony and statements at the hearings), and the availability of judicial review and retrospective relief. Due process does not require procedures "so comprehensive as to preclude any possibility of error." *Mackey*, 443 U.S. at 13.

In any event, ACLU does not point to any *actual* prejudice resulting from the lack of *additional* interpreter services. *See Gutierrez-Chavez v. INS*, 298 F.3d 824, 830 (9th Cir. 2002) ("To make out a violation of due process as the result of an inadequate translation, Gutierrez must demonstrate that a better translation likely would have

made a difference in the outcome."); *Kuqo v. Ashcroft*, 391 F.3d 856, 859 (7th Cir. 2004) ("A generalized claim of inaccurate translation, without a particularized showing of prejudice based on the record, is insufficient to sustain a due process claim."); *State v. Storhoff*, 133 Wn.2d 523, 528, 946 P.2d 783 (1997) (due process violation requires actual prejudice); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005) (same).

ACLU relies on other-jurisdiction cases involving distinct factual situations involving *pro se* litigants and cases involving the risk of loss of serious liberty interest such as deportation or criminal prosecutions to claim that due process required the Department to provide an interpreter for Kustura, Lukić, and Memišević beyond what was provided by the Board in this case. ACLU at 15-19. ACLU's reliance is misplaced.

Figueroa v. Doherty, 707 N.E.2d 654 (Ill. Ct. App. 1999), involved a situation where a *pro se* LEP unemployment benefit claimant brought an interpreter to the hearing. But a referee told the interpreter to only summarize, not translate verbatim, the claimant's testimony and directed the interpreter to only translate as evidence against the claimant a "highly inaccurate" *1-sentence summary* of a key adverse witness's testimony, which occupied seven out of the 15-page transcript of the entire hearing. *Figueroa*, 707 N.E.2d at 656-658. The *Figueroa* Court held that the claimant was denied his right to testify on his own behalf and a fair

hearing. *Figueroa*, 707 N.E.2d at 659. Unlike the *pro se* claimant in *Figueroa*, who was not allowed to have his testimony translated word for word and was given a "not merely incomplete, but also highly inaccurate summary of the evidence against him," *Figueroa*, 707 N.E.2d at 659, all of the claimants here were represented by an attorney and provided with an interpreter, who translated their testimony word for word, and there is no claim they had inaccurate evidence imposed against them.

Lizotte v. Johnson, 777 N.Y.S.2d 580 (N.Y. Sup. Ct. 2004), involved a *pro se* LEP claimant for foster care payments at special rate, who was never explained of the nature of the hearing or her burden of proof, was not allowed to see the exhibits offered and admitted against her, was not provided the translation of any of the discussion between the hearing officer and her adverse party about the exhibits, and was not asked sufficient relevant questions by the hearing officer to explain her case. *Lizotte*, 777 N.Y.S.2d at 582-586. The *Lizotte* Court held that the "failure of the hearing officer to fully develop the record and to ensure that the hearing was conducted in compliance with the minimum requirements of due process deprived [the claimant] of her right to a fair hearing and due process of law." *Lizotte*, 777 N.Y.S.2d at 588. Unlike the situation in *Lizotte*, the claimants here were all represented by an attorney, and there is no claim they were deprived of an opportunity to complete the record.

Yellen v. Baez, 676 N.Y.S.2d 724 (N.Y. City Civ. Ct. 1997), involved the issue of whether a *pro se* LEP tenant facing summary eviction should be charged with the deposit of rent under a state statute on the basis of two adjournments that occurred due to the unavailability of an interpreter. *Yellen*, 676 N.Y.S.2d at 724-727. In ruling that the adjournments may not be charged against the tenant, the *Yellen* Court emphasized, "The unjust and ludicrous result is that the time is charged against the tenant when the Court cannot even inform the tenant of his or her rights, including the right to counsel, let alone discuss the intricacies of the new 'rent deposit' law or the merits of the case." *Yellen*, 676 N.Y.S.2d at 725. Unlike the *pro se* tenant in *Yellen*, who was penalized without being informed of the nature of the proceeding *brought against him*, all of the claimants here initiated their appeals through their attorney and were never penalized on account of their inability to obtain an interpreter.

ACLU relies on deportation and criminal cases.[5] But the interests at stake *in this case* – appeals for more benefits than were awarded and

[5] *See Santana v. Coughlin*, 457 N.Y.S.2d 944 (1982) (due process violation when a LEP inmate facing a disciplinary proceeding with a 120-day confinement penalty was denied word-for-word translation of his testimony, was given inaccurate translation, and was not informed of his right to call witnesses); *Augustin v. Sava*, 735 F.2d 32 (E.D.N.Y. 1984) ("likely" due process violation when a LEP appeared *pro se* at the deportation hearing and was given "nonsensical" translation of his testimony with the "accuracy and scope of the hearing translation [being] subject to grave doubt"); *Nazarova v. INS*, *supra*, 171 F.3d at 484 ("A non-English-speaking alien has a due process right to an interpreter at her deportation hearing[.]"); *State v. Mendez*, 56 Wn. App. 458, 462-463, 784 P.2d 168 (1989) (the trial court has no "affirmative obligation to appoint an

interpreter services during the Department claim administration – are "qualitatively deferent from the interest of one defending against criminal prosecution, deportation or exclusion." *Abdullah*, 184 F.3d at 165; *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 n.22, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) ("The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases . . .."); *In re Grove*, 127 Wn.2d at 237 (in civil cases, the constitutional right to counsel "is presumed to be limited to those case in which the litigant's physical liberty is threatened, or where a fundamental liberty interest, similar to the parent-child relationship, is at risk). The more serious the interest, the more safeguards are required. *Mathews*, 424 U.S. at 334-335.

California's Supreme Court has rejected a civil, indigent, and represented LEP litigant's due process challenge to the trial court's denial of an interpreter for attorney-client communications, because the court proceedings were "controlled by counsel," and the litigant was "in no worse position than the numerous represented litigants who elect not to be

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interpreter for a defendant where that defendant's lack of fluency or facility in the language is not apparent"); *Negron v. State*, 434 F.2d 386, 389-390 (2nd Cir. 1970) (a LEP defendant accused of homicide has a right to have the murder trial translated); *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) (the trial court in a criminal case has "wide discretion in determining whether an interpreter is necessary" based on "various factors, including the complexity of the issues and testimony presented during trial and the language ability of the defense counsel"); *Wilson v. United States*, 391 F.2d 460, 463 (D.C. Cir. 1968) (a criminal defendant "must be competent to stand trial); *People v. Estrada*, 176 Cal. App. 3d 410, 416 (1986) (a criminal defendant waives any objection to the qualifications of the interpreter if not timely raised).

present in court at all." *Jara v. Municipal Court*, 578 P.2d 94, 96-97 (Cal. 1978). The same rationale should apply in this case. Like the litigant in *Jara*, all of the claimants in this case were represented. Further, they were not found to be indigent and were provided with an interpreter for at minimum their testimony. The record reveals that the IAJs properly exercised their discretion in limiting the scope of interpreter services based on the nature of each case. ACLU fails to demonstrate otherwise.

III. CONCLUSION

ACLU fails to demonstrate a due process violation. For the reasons stated in this and its previously-filed response brief, the Department requests that the Court affirm the Superior Court judgments below in these consolidated cases.

SUBMITTED this 30th day of August, 2007.

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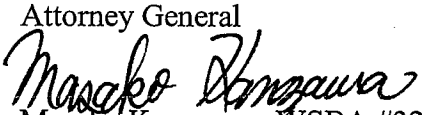

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